Supreme Court, U. S.
FILED
AUG 12 1976
MICHAEL RODAK, JR., CLERK

76-211

IN THE SUPREME COURT OF THE UNITED STATES

Monroe County Probate Court, et al.,

Petitioners,

-vs-

Dahlari Weldon, et al.,

Respondents.

No. A-1067

PETITION FOR WRIT OF CERTIORARI

* * *

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BUGBEE & CONKLE

Warren D. Wolfe, Esq.
Gregory B. Denny, Esq.
13th Floor Toledo Trust Building
Toledo, Ohio 43604
Telephone: (419) 244-6788

and

EDWARD H. DEVOE, ESQ.

Monroe County Prosecutor's Office
Monroe County Courthouse
Monroe, Michigan 48161
Telephone: (313) 241-9535

Attorneys for Petitioners

MICHIGAN LEGAL SERVICE ASSISTANT PROGRAM

Gabe Kaimowitz, Esq.
Wayne State School of Law
Annex Building
Detroit, Michigan 48202
Telephone: (313) 577-4822

Attorneys for Respondents

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Annex Building
Detroit, Michigan 48202
Telephone: (313) 577-4822

Attorneys for Respondents

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JURISDICTIONAL BASIS

The Honorable Harry J. Seitz, Judge of the Monroe County Probate Court; James H. Stanifer, Juvenile Referee of the Monroe County Probate Court and Shirley Friess, Juvenile Caseworker for the Monroe County Probate Court, hereinafter referred to as "petitioners," hereby petition the Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit entered February 12, 1976. Petitioners timely filed a petition for rehearing of the February 12, 1976, decision of the Sixth Circuit, but said petition was denied by the Sixth Circuit on March 19, 1976. On June 4, 1976, Mr. Justice Potter Stewart, upon petitioners' application for extension of time to file their petition for writ of certiorari, extended to August 16, 1976, the time in which to file the present petition. The Court has jurisdiction to review the decision rendered by the United States Court of Appeals for the Sixth Circuit by virtue of the provisions contained in 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. In light of the fact that respondents failed to exhaust adequate and available state court remedies, did the federal district court have jurisdiction to grant respondents a declaratory judgment that the proceedings by the Monroe County Probate Court violated respondents' due process rights and to retain jurisdiction over the action pending the conclusion of litigation in the courts of the State of Michigan?

2. Whether the United States Court of Appeals for the Sixth Circuit misapplied the established federal law and public policy prohibiting federal court intervention in state court proceedings, as ex-

pressed in the Younger v. Harris line of cases, by affirming the federal district court's declaratory judgment and the federal district court's retention of jurisdiction over the action pending the conclusion of litigation in the courts of the State of Michigan?

3. Even if the federal district court possessed jurisdiction under the Civil Rights Act, whether notions of comity, equity and federalism required the district court to dismiss the action and refrain from issuing a declaratory judgment?

4. Whether the mere termination of parental rights constitutes great and immediate irreparable harm, as contemplated by the Younger v. Harris line of cases, so as to warrant federal court intervention into state court proceedings?

5. Whether the proceedings held by the petitioners resulting in the termination of respondent Dahlari Weldon's parental rights to respondent Maria Sophia Weldon violated respondents' constitutional due process rights?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law . . . .

28 U.S.C. Section 1331:

(a) The district courts shall have original juris-

diction of all civil actions wherein the matter in controversy exceeds the sum of value of Ten Thousand Dollars ($10,000), exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (4) to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. Section 2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. Section 2254(b):

An application for a writ of habeas corpus in

behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

M.C.L.A. Section 712A.21:

Any interested person, at any time while the child is under the jurisdiction of the court, may file a petition, in writing and under oath, for a rehearing upon all matters coming within the provisions of this chapter, and upon the rehearing the court may affirm, modify or set aside any order so reviewed. If parental rights have been terminated by an order entered in the proceedings and custody of the child has been removed from the parents, guardian or other person, the petition for rehearing shall be filed within three months from the date of entry of the order terminating parental rights . . . . The rehearing shall be conducted in accordance with the provisions of this chapter relative to the conduct of original hearings. At any time the court may enter an order for supplemental disposition as long as the child remains under the jurisdiction of the court.

M.C.L.A. Section 712A.22:

Appeal may be taken to the circuit court by the prosecuting attorney or any person aggrieved by any order of the juvenile division of the probate court. . . . The pendency of an appeal shall not suspend the order unless the circuit court shall specifically so order. A petition for a delayed appeal shall be filed within six months after the making of the judgment or order complained of.

M.C.L.A. Section 600.4307:

An action for habeas corpus to inquire into the cause of detention may be brought by or on behalf of any person restrained of his liberty within this state under any pretense whatsoever, except as specified in Section 4310.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Petitioners seek review of the February 12, 1976, decision of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Eastern District of Michigan (1) granting respondents a declaratory judgment that the proceedings in the Monroe County Probate Court before petitioners resulting in the termination of parental rights of respondent Dahlari Weldon, hereinafter referred to as "Dahlari," to her natural daughter, respondent Maria Sophia Weldon, hereinafter referred to as "Maria," violated Dahlari's and Maria's due process rights and (2) retaining jurisdiction over the action pending conclusion of litigation in the courts in the State of Michigan.

The history of the present action dates back to April, 1972, at which time the Monroe County Sheriff's Department was advised by Dahlari's mother that Dahlari had been missing from home for almost a month and had not been attending school. After being found with a male friend by a Sheriff's Deputy, Dahlari was cited to appear at the Youth Bureau of the Monroe County Sheriff's Department on April 5, 1972.

On April 5, 1972, the intake referee for the Juvenile Division for the Monroe County Probate Court

conducted a preliminary hearing and advised Dahlari and her mother and father of their constitutional rights, including Dahlari's right to counsel. Because Dahlari refused to return to her mother's home and her father had no plan for Dahlari, a delinquency petition was filed against Dahlari for deserting home without sufficient cause and repeatedly disobeying the lawful commands of her parents in violation of M.C.L.A. Section 712A.2(a)(2) of the Probate Code of Michigan. An adjudicatory hearing was held on the delinquency petition on April 25, 1972, by petitioner James Stanifer. During this hearing, both Mr. and Mrs. Weldon and Dahlari stated that they had been advised by the intake referee on April 5, 1972, of their rights, including their right to counsel, and they stated that they desired to proceed in the matter without counsel. As a result of the April 25, 1972 hearing, an order was entered by petitioner Judge Harry Seitz, upon the recommendation of petitioner James Stanifer, adjudicating Dahlari a delinquent minor child.

At the dispositional hearing on the delinquency charge held June 9, 1972, before petitioner Judge Seitz, the matter of Dahlari's child, Maria Sophia Weldon, was first brought to the court's attention. Although Dahlari did not know the whereabouts of her child, Judge Seitz finally ascertained that the child was in Monroe, Michigan, with Dahlari's mother. Upon learning this fact, Judge Seitz ordered Mrs. Weldon to produce Maria at once so that a medical examination could be made to ascertain the health and status of the baby. At the conclusion of this hearing, the disposition on the delinquency matter of Dahlari was taken under advisement.

When Mrs. Weldon failed to produce the child in compliance with the court's order, a petition was

filed in the Juvenile Division of the Monroe County Probate Court alleging that Maria was a minor without legal home or guardian within the meaning of M.C.L.A. Section 712A.2(b)(1) of the Michigan Probate Code. After the filing of said petition, Judge Seitz entered an order directing the baby be taken into the temporary custody of the court. After determining that Mrs. Weldon and Maria were in Wood County, Ohio, Wood County officials were notified of the situation and took custody of the baby on June 15, 1972. After a hearing, the Wood County Juvenile Court ordered the baby released to a representative of the Monroe County Probate Court. Petitioner Shirley Freiss thereafter took custody of Maria and returned with her to Monroe County, Michigan.

On June 19, 1972, Judge Seitz appointed John J. Sullivan, an attorney duly authorized to practice law in the State of Michigan, as guardian ad litem for Dahlari. On this same day Dahlari was served with notice of a hearing to be held July 11, 1972, on the question of Maria which could result in the termination of Dahlari's parental rights and which notice advised Dahlari of her right to counsel. On June 27, 1972, Judge Seitz appointed Oliver Golden, an attorney duly authorized to practice law in the State of Michigan, as guardian ad litem for baby Maria.

On July 11, 1972, an adjudication hearing was held on the neglect petition regarding Maria. Among those present at this hearing were: Dahlari; Dahlari's father; John J. Sullivan, guardian ad litem for Dahlari; Oliver Golden, guardian ad litem for Maria; and E. J. McCormick, attorney for Dahlari's mother. At the conclusion of this hearing, Judge Seitz announced, in open court, his findings that Maria was without legal home or guardian and that

the mother, Dahlari, was in the custody of the court as a delinquent minor without adequate means of support. Accordingly, Judge Seitz adjudicated Maria to be a neglected child and ordered that she be made a temporary ward of the court, placing Maria in foster care pending the dispositional hearing.

The dispositional hearing on the neglect case regarding Maria was scheduled for August 11, 1972, notice of which was duly served on Dahlari, Mr. Sullivan, Mr. Golden, Dahlari's parents and their attorney, Mr. McCormick. Those present at the August 11, 1972, dispositional hearing were: Dahlari, Mr. Sullivan, Mr. Golden, Mr. Weldon, and Mr. McCormick, who appeared as attorney for both Mr. and Mrs. Weldon. During the hearing, petitioner Shirley Friess, a caseworker assigned to the Weldon matter, recommended that the child be made a permanent ward of the court since no plan for the care of Maria had been presented to her by either Dahlari, Mr. Weldon, Mrs. Weldon or their attorney. Upon the conclusion of the hearing, petitioner Judge Seitz continued under advisement the delinquency matter of Dahlari and took the neglect matter of Maria under advisement.

During the August 11, 1972, hearing, Mr. McCormick, attorney for Mr. and Mrs. Weldon, asked for time to prepare a plan for Dahlari and Maria, which would involve both of them living in Bowling Green, Ohio. Mr. Golden, on behalf of Maria, favored a family placement subject to strict court supervision. When the matter was taken under advisement, Judge Seitz directed Mrs. Friess to see whether the Wood County, Ohio, authorities would supervise the mother and child. Shirley Friess was later advised by Wood County authorities that they would

not supervise Dahlari and Maria, and this fact was made known to Judge Seitz.

On September 12, 1972, and after receiving Shirley Friess' report, Judge Seitz issued an order making Maria a permanent ward of the court and terminating Dahlari's parental rights to her child. On this same date, Judge Seitz signed an order making Dahlari a temporary ward of the court and committing her to the Department of Social Services as a delinquent. Copies of these orders were duly served upon Dahlari.

On October 31, 1972, Peter J. Betrus, an attorney duly authorized to practice law in the State of Michigan, filed an entry of appearance on behalf of Mr. and Mrs. Weldon concerning the matter of Dahlari and Maria in the Monroe County Probate Court. On February 12, 1973, Gabe Kaimowitz, an attorney duly authorized to practice law in the State of Michigan, was contacted about representing Dahlari concerning the action taken by the Monroe County Probate Court on September 12, 1972.

COURSE OF PROCEEDINGS BELOW

Under Michigan law, Dahlari and Maria had available to them three separate avenues in the state courts of Michigan for attacking the September 12, 1972, order of the Monroe County Probate Court. A petition for rehearing, pursuant to M.C.L.A. Section 712A.21, could have been filed in the Monroe County Probate Court within three months from the date of the order terminating parental rights. M.C.L.A. Section 600.4307 provides for a petition for writ of habeas corpus which could have been filed with the Monroe County Circuit Court. Respondents also had the right to appeal the Probate Court's termination order to the Monroe County Circuit Court. In regard to this appeal, M.C.L.A. Section 712A.22 of the

Michigan Probate Code provides that a petition for a delayed appeal may be filed within 6 months from the date of the judgment or order complained of. Respondents' constitutional claims respecting the Probate Court proceedings could have been adequately raised and adjudicated in all of these available state court proceedings. It should be noted that only after the October 25, 1973, order of the federal district court holding the proceedings in the Monroe County Probate Court to have violated Dahlari's constitutional due process rights, did Dahlari file a habeas corpus petition in the Monroe County Circuit Court.

Despite the various state court remedies available to them, Dahlari and Maria filed a complaint on May 2, 1973, almost eight months after the Monroe County Probate Court's order, in the United States District Court for the Eastern District of Michigan alleging jurisdiction under 28 U.S.C. Sections 1331 and 1343 and 42 U.S.C. Section 1983. The complaint alleged various violations of Maria's and Dahlari's constitutional rights during the proceedings in the Monroe County Probate Court and sought injunctive and monetary relief. In their answer, petitioners alleged (1) that the complaint failed to state a claim upon which relief could be granted; (2) since the respondents failed to exhaust the available remedies in the courts of the State of Michigan, the federal district court was without jurisdiction to entertain plaintiff's prayer for relief; (3) respondents had an adequate remedy at law in the courts of the State of Michigan and (4) in keeping with the doctrines of abstention, equity, and federalism the district court must refuse to entertain the complaint.

After granting petitioners' motion for summary judgment on the monetary damage issue, the federal district court conducted a hearing on the merits of

Dahlari's and Maria's claims for temporary and permanent injunctive relief. The final judgment of the District Court, filed October 25, 1973, held (1) that the proceedings in the Monroe County Probate Court terminating Dahlari's parental rights to Maria were void because Dahlari's parental rights were terminated in violation of the due process clause of the Fourteenth Amendment; (2) remanded the matter to the Monroe County Probate Court for a hearing within 30 days; and (3) denied Dahlari's and Maria's claims for money damages.

Petitioners perfected an appeal to the United States Court of Appeals for the Sixth Circuit seeking a reversal of the judgment of the federal district court. On April 19, 1974, the Sixth Circuit held: (1) that the district court properly dismissed Dahlari's and Mari's claims for money damages and (2) that the district court did not have jurisdiction under 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343 to review and set aside the Probate Court's proceedings and to order that court to conduct another hearing. In addition, the Sixth Circuit remanded the case to the district court to consider whether a Section 1983 action may be maintained against the individual defendants, whether the district court could fashion appropriate relief not barred by Preiser v. Rodriquez, 411 U.S. 475 (1973), and whether notions of comity otherwise required deferral to state procedures. In the alternative, the district court was to consider whether to treat the action as an application for habeas corpus, and, if so considered, whether respondents were required to satisfy the exhaustion requirements of 28 U.S.C. Section 2254(b).

After briefs and oral arguments, the district court rendered judgment on July 25, 1974, holding that part of the action was in the form of habeas

corpus over which the district court lacked jurisdiction, since respondents failed to satisfy the exhaustion requirement of 28 U.S.C. Section 2254(b). The district court also held injunctive relief under 42 U.S.C. Section 1983 against the individual petitioners was not warranted. Despite these holdings, the district court, nevertheless, granted Dahlari and Maria a declaratory judgment that their due process rights had been violated by the petitioners and retained jurisdiction over the cause pending conclusion of litigation in the courts of the State of Michigan. An appeal from this judgment resulted in an affirmanace by the United States Court of Appeals for the Sixth Circuit without the Sixth Circuit ever reaching the merits of the constitutional due process issue involved in the action. It is from this decision that petitioners presently seek review.

Maria has been in the custody of Mr. and Mrs. John Doe since September 12, 1972. On February 4, 1973, Mr. and Mrs. Doe filed a petition in the Monroe County Probate Court to adopt Maria. In November of 1973, at which time the Ocotber 25, 1973, decision of the federal district court was being appealed to the U.S. Court of Appeals for the Sixth Circuit, Mr. and Mrs. Doe filed a complaint in superintending control in the Monroe County Circuit Court. Sometime thereafter, Dahlari petitioned the Monroe County Circuit Court for habeas corpus relief.

On March 6, 1974, the Circuit Court for Monroe County declared Dahlari to be entitled to the custody of Maria and ordered Mr. and Mrs. Doe to produce the child. This order of the Monroe County Circuit Court was based upon the court's finding that the matter was res judicata as a result of the October 25, 1973, order of the federal district court. The Does' filed an application for leave to appeal the Circuit

Court's order in the Michigan Court of Appeals. On August 28, 1974, the Michigan Court of Appeals, relying on the July 25, 1974, declaratory judgment of the federal district court which is the subject of the present petition, denied the Does' application for leave to appeal. The March 6, 1974, order of the Monroe County Circuit Court has been stayed by the Michigan Supreme Court, and proceedings are presently pending in the Michigan Supreme Court seeking review of the Monroe County Circuit Court's order.

ARGUMENT

The decision of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the federal district court granting respondents a delcaratory judgment and retaining jurisdiction of the action pending conclusion of litigation in the courts of the State of Michigan violates the public policy and principles laid down by this Court in Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) and its companion case, Samuels v. Mackel, 401 U.S. 66, 27 L. Ed. 2d 688, 91 S. Ct. 764 (1971). In light of this established public policy against federal court interference with state court proceedings, as further enunciated by this Court in its recent decisions in Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975) and Hicks v. Miranda, ____ U.S. ____, 45 L. Ed. 2d 223, 95 S. Ct. ____ (1975), the decision of the Sixth Circuit directly conflicts with the established law regarding the proper balance between the federal and state court systems.

In Younger v. Harris, supra, the Court reaffirmed the long-standing national policy forbidding federal courts from staying or enjoining pending state court proceedings except under very limited

and extraordinary circumstances, such as where irreparable injury is both great and immediate, or where the state law is flagrantly and patently violative of express constitutional prohibitions, or where there is a showing of bad faith or harrassment in the enforcement of the state law.

Although Younger v. Harris, supra, concerned federal intervention by way of injunctive relief, its companion case, Samuels v. Mackel, supra, dealt with the propriety of a federal district court interfering with pending state court proceedings by way of delcaratory relief. In Samuels v. Mackel, the Court held that the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well. This Court reasoned that ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the established policy limiting injunctions was designed to avoid. This interference with state court proceedings by way of declaratory relief results from the potential of subsequent federal court injunctions to protect and effectuate the federal court's declaratory judgment and the res judicata effect of the declaratory judgment upon the state courts.

Michigan law provided respondents with three separate avenues for attacking the September 12, 1972, order of the Monroe County Probate Court. A petition for rehearing could have been filed in the Probate Court, an appeal could have been taken from the Probate Court order to the Monroe County Circuit Court, or habeas corpus relief could have been

sought in the state courts of Michigan. These state court remedies were available and adequate to raise the constitutional claims of respondents regarding the proceedings in the Monroe County Probate Court. Rather than pursuing their state court remedies to attack the Probate Court order, respondents filed their complaint in federal district court on May 3, 1973, approximately eight months after the order terminating respondent Dahlari's parental rights to Maria.

Petitioners acknowledge that at the time the action was commenced in federal district court there were no state court proceedings pending. However, based on the decision in Huffmanv. Pursue, Ltd., supra, respondents can not escape the Younger doctrine prohibiting federal court interference merely because they chose not to pursue their state court remedies. In Huffman v. Pursue, Ltd., the Court held that Younger principles are applicable even though the state proceeding is civil in nature and even though the federal action was commenced after the state trial court's judgment. Regardless of when the state trial court's judgment became final, Younger standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies before seeking relief in federal district court. The considerations of comity and federalism which underlie Younger permit no truncation of the exhaustion requirements merely because the losing party in the state court of general jurisdiction believes that his chances of prevailing on appeal in the state courts are not auspicious. The decision in Huffman v. Pursue, Ltd., supra, required the federal district court to refrain from issuing a declaratory judgment and to dismiss the action in deference to the State courts of Michigan.

The respondents have failed to show the existence of those narrowly defined, extraordinary circumstances warranting a relaxation of the Younger prohibition against federal court interference with state court proceedings. The respondents have not alleged that any particular Michigan statute is unconstitutional, let alone flagrantly and patently unconstitutional. The respondents have not alleged that the Monroe County Probate Court proceedings were conducted with an intention to harass or in bad faith. And lastly, respondents have not shown and the federal district court did not find that great and immediate irreparable harm, such as contemplated by Younger, would be suffered by respondents if the federal district court refused to entertain respondents' complaint. In fact, a period of almost eight months elapsed before respondents took any action whatsoever to attack the order of the Monroe County Probate Court. This eight month delay in seeking any kind of review of the Probate Court order surely vitiates against any contention made by respondents that the harm they would suffer if the federal court deferred to the state courts of Michigan would be great and immediate.

The Younger doctrine of federal court non-interference exists to prevent interference with and disruption of state court proceedings. Such interference and disruption has manifested itself in the present action and has resulted in the matter of respondent Maria being unresolved after more than three years of litigation in both the federal and state courts. After the October 25, 1973, decision of the United States District Court rendering the September 12, 1972, termination order of the Monroe County Probate Court void, Dahlari filed a petition for writ of habeas corpus in the Monroe County Circuit Court. The Circuit Court, finding that the federal district court's order was res judicata, ordered Maria returned to Dahlari. The prospective adoptive parents filed leave to appeal the Circuit Court's order to the Michigan Court of Appeals. The Michigan Court of Appeals, relying on the July 25, 1974, declaratory judgment of the United States District Court denied leave to appeal. Proceedings are presently pending in the Supreme Court of Michigan seeking consideration and review of the order of the Monroe County Circuit Court requiring that Maria be returned to Dahlari. The matter of Maria has been litigated in the state courts of Michigan for almost three years, and because of the res judicata effect given to the judgments of the federal district court, no state court of Michigan has reached the merits of respondents' constitutional attack on the Probate Court's order of September 12, 1972.

In addition to the principles laid down in Younger v. Harris, supra, the United States District Court was also required to dismiss this action by virtue of this Court's holding in Presier v. Rodriquez, 411 U.S. 475, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973). In Preiser v. Rodriquez, the Court held that a state prisoner could not challenge the validity of the fact or duration of this detention by bringing an action under 42 U.S.C. Section 1983, but rather was required to proceed by way of habeas corpus under 28 U.S.C. Section 2254. The Court went on to hold that Congress had determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact of their confinement and that the exhaustion requirement attendant with habeas corpus could not be circumvented by proceeding under the Civil Rights Act.

The essence of respondents' complaint filed in the federal district court attacks the constitutionality of the Monroe County Probate Court pro-

ceedings which resulted in respondent Maria being made a permanent ward of the court and the termination of respondent Dahlari's parental rights to Maria. In applying Preiser v. Rodriquez, supra, and determining that plaintiffs had failed to exhaust their available state court remedies, the federal district court held that it lacked jurisdiction to order the petitioners to return Maria to Dahlari. However, the federal district court went on to hold that it did have juristiction to determine the constitutionality of the Probate Court proceedings which resulted in the termination order.

The holding in Preiser v. Rodriquez, supra, not only bars that portion of respondents' complaint which seeks direct release of Maria, but also must be read to bar the basis for jurisdiction which the federal district court claimed it "clearly" had. The complaint filed in federal district court attacked the constitutionality of the Probate Court proceedings, and in the words of Preiser, supra, the respondents were challenging the "validity of the fact" of respondent Mari's confinement. As a result, the entire complaint must be viewed as an application for a writ of habeas corpus requiring exhaustion of state court remedies. To hold otherwise, as the Sixth Circuit has, would be to under cut the purpose and policy contained in the Preiser line of cases and to allow access to federal court without requiring exhaustion of state court remedies.

In addition to the very important and critical jurisdictional issues raised by the present petition, there also exists the issue of whether the proceedings in the Monroe County Probate Court resulting in the termination order of September 12, 1972, violated the constitutional due process rights of respondents. Throughout the course of these federal

proceedings the petitioners have maintained that the due process requirements and standards laid down by the Court in In re Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967) were clearly satisfied. According to the records of the Probate Court proceedings and the testimony during the trial in federal district court, the United States District Court's judgment that the Probate Court's proceedings violated the constitutional due process rights of respondents was clearly against the manifest weight of the evidence.

The merits of this constitutional due process issue were properly and clearly before the United States Court of Appeals for the Sixth Circuit on two separate occassions, and yet the Sixth Circuit failed to reach the merits of the constitutional issue. On February 12, 1976, the Sixth Circuit affirmed the district court's declaratory judgment, yet said affirmance was based solely on the Sixth Circuit's decision of the jurisdictional issues involved. Petitioners filed a petition for rehearing of the February 12, 1976, order of the Sixth Circuit specifically requesting the Sixth Circuit to decide the merits of the constitutional issue and stating that petitioners had never waived this issue in the Sixth Circuit, but the Sixth Circuit summarily denied said petition for rehearing. The constitutional issue in the present action has been before numerous state and federal courts over the past three years and yet only one court, the United States District Court, considered the merits of the respondents' constitutional due process claims. The decision of the Sixth Circuit affirming the federal district court's finding that the Probate Court proceedings violated the constitutional rights of respondents is against the manifest weight of the evidence; and, therefore, this Court must consider and reverse said decision.

Based on the critical jurisdictional issues and the failure and refusal of the Sixth Circuit to consider the constitutional due process issue, petitioners respectfully submit that this Court must grant a writ of certiorari to review the February 12, 1976, decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

EDWARD H. DEVOE

and

BUGBEE & CONKLE

By Warren D. Wolfe
Attorneys for Petitioners
Judge Harry J. Seitz, James
Stanifer and Shirley Friess
13th Floor, Toledo Trust Bldg.
Toledo, Ohio 43604
Telephone: (419) 244-6788

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were duly served on Gabe Kaimowitz, Esq., Attorney for Respondents Dahlari Weldon and Maria Sophia Weldon, Wayne State School of Law, Annex Building, Detroit, Michigan 48202 and Bettye S. Elkins, Esq., Guardian Ad Litem for Respondent Maria Sophia Weldon, 2700 City National Bank Building, Detroit, Michigan 48226, by ordinary United States mail, first class postage prepaid, this 10th day of August, 1976.

EDWARD H. DEVOE
and
BUGBEE & CONKLE

By Warren D. Wolfe
Attorneys for Petitioners
Judge Harry J. Seitz, James
Stanifer and Shirley Friess
13th Floor, Toledo Trust Bldg.
Toledo, Ohio 43604
Telephone: (419) 244-6788

APPENDIX
OF JUDGMENTS & OPINIONS
BELOW.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAHLARI WELDON, et al,

Plaintiffs,

vs. CIVIL ACTION
No. 40054

MONROE COUNTY PROBATE COURT,

et al, Defendants.

_____/

MEMORANDUM OPINION AND ORDER
ON INJUNCTIVE ISSUES

This stage of these proceedings requires that the Court determine whether it has, and should invoke its jurisdiction to grant equitable relief to plaintiffs herein based on their joint and separate claims of their respective deprivation of federally guaranteed rights under the Constitution and various statutes.

To that end the Court first makes the following findings of act, using a narrative form for the sake of continuity and clarity.

On October 18, 1971, when she was 14 years of age and unmarried, plaintiff Dahlari Weldon gave birth to a daughter, Marie Sophia Weldon. The baby was taken by plaintiff Dahlari to the home of her mother, Mrs. Frank Weldon. At that time, and for a period thereafter, Mr. and Mrs. Frank Weldon were

experiencing marital difficulties and were living apart. It cannot be gainsaid that this atmosphere was a contributing factor to plaintiff Dahlari's subsequent problems.

Plaintiff Dahlari and her mother had a number of confrontations and Dahlari skipped school and left home on several occasions, at times going to her father's residence, leaving the baby with her mother. The result was the filing of a delinquency petition against Dahlari on April 5, 1972, for deserting her home without sufficient cause. (M.C.L.A. 712A.2. (See Ex. 4, Defendants Requests for Admissions). A preliminary hearing was held that day before Referee Mario Pace and Dahlari was committed to the Monroe County Shelter Home. (Ex. 5). No transcript of the proceeding was made and no bond was set. An adjudication hearing was set for April 25, 1972. Mrs. Weldon was personally served with a summons on April 10, 1972 and Mr. Weldon by certified mail on April 14, 1972.

On April 25, 1972, both parents of Dahlari appeared before Referee James H. Stanifer and the following colloquy took place regarding counsel:

"THE COURT: All right, as you recall further, Mr. and Mrs. Weldon, before the intake worker of this Court on April 5, 1972, among other things you were advised that you could have an attorney to represent your child in matters of this nature. Since you have not requested an attorney, no attorney has filed any appearance, I assume you wish to proceed without legal counsel in reference to your child and this alleged juvenile offense, is this correct?

MR. WELDON; Yes, we do.

THE COURT: Mrs. Weldon?

MRS. WELDON; Yes."

No inquiry was directed to Dahlari regarding counsel nor regarding any objection to a referee, rather than a judge, presiding.

A dispositional hearing was then scheduled for May 26, 1972, but adjourned to June 9, 1972, when Mrs. Weldon objected to a referee presiding. In the interim, Dahlari was released to her mother, who, on June 6, 1972, reported that Dahlari was missing from home. She was again taken into custody and committed to the Shelter Home.

At the June 9, 1972 dispositional hearing, the Honorable Harry J. Seitz, Jr., Probate Judge of Monroe County, took the matter under advisement, apparently accepting the recommendation of a caseworker, Mrs. Friess. The latter had planned to recommend home placement but the June 6, 1972 incident prompted further study. Dahlari was ordered to remain in custody.

It was at that hearing, on June 9, 1972, that the matter of the baby, Maria Sophia Weldon, was brought directly to the attention of the court. In fact, most of the proceedings were spent in determining the condition and whereabouts of baby Maria. Judge Seitz ordered Mrs. Weldon to produce the baby for a medical examination. On the same day a petition was filed by a deputy sheriff "In the matter of Maria Sophia Weldon" alleging that she was without a legal home or guardian within the meaning of M.C.L.A. § 712A.2(1), (Ex. 13). Simultaneously there was an order entered to take the baby Maria into the temporary custody of the court. (Ex. 14).

Rather than surrender the child Mrs. Weldon fled with her to the home of another daughter in Wood County, Ohio, the original home of the Weldons. Apparently alerted by Monroe County, Michigan, probate authorities, Wood County

juvenile officials took custody of the baby on June 15, 1972, and ordered her released to a representative of the Monroe County Probate Court (Ex. 17). On June 16, 1972, Judge Seitz signed a request that Wood County Juvenile Court release the child to Shirlie Friess. The latter, thereupon , took custody of the baby and returned with her to Michigan.

A hearing was set for July 11, 1972 on the June 9, 1972 neglect petition regarding the baby Marie and a summons was served on plaintiff Dahlari on June 19, 1972, while she was in custody at the Shelter Home. (Plaintiff Dahlari disputes any such service.)

At the July 22, 1972, hearing, the following were present:

Jan Teague, Assistant Prosecuting Attorney,
John J. Sullivan, Attorney for Dahlari Weldon,
Oliver Golden, Attorney and Guardian Ad Litem,
E. J. McCormick, Attorney for Mrs. Weldon,
Dahlari Weldon, Minor (Mother of the Child),
Frank Weldon, Father of Dahlari Weldon,
Frank Atkinson, Youth Officer, Monroe County Sheriff's Department, and
Shirlie Friess, Caseworker.

Upon the opening of the hearing, an oral motion was made and granted that the neglect petition be amended to reflect that Dahlari was an unwed mother and without adequate means of support. Mrs. Friess then testified that Mr. Weldon had not provided an acceptable plan for the baby Maria. Mr. Weldon testified that he and his wife had resolved their marital problems, were living together and that he was employed in Toledo and could support the child.

At the conlusion of the hearing Judge Seitz ordered that baby Maria ". . . be, and is hereby

adjudicated to be a neglected child, and a temporary ward of this Court." and set a disposition hearing for August 11, 1972. The baby was continued in foster care.

On August 11, 1972, the following were present:

E. J. McComrick, Jr., Attorney for Mr. and Mrs. Weldon,
Oliver J. Golden, Attorney for Marie Weldon,
John J. Sullivan, Attorney for Dahlari Weldon,
Shirlie Friess, Caseworker and Probation Officer,
Frank Weldon, Father of Dahlari Weldon, and
Dahlari Weldon, Mother of Marie Sophia Weldon, a/k/a Marie Sophia Thomas.

(Again, plaintiff Dahlari disputes service and denies that she was actually in the courtroom.)

At this hearing Mrs. Friess testified that the baby Marie had been examined and found to be healthy but that plaintiff Dahlari had informed her that Mrs. Weldon had physically abused the baby. Mrs. Friess recommended that the baby Marie be made a permanent ward of the court.

Mr. Weldon again testified that he would support the baby and that he would have no objection to strict supervision of the care by Ohio authorities.

The court thereupon took both the delinquency matter of Dahlari and the neglect matter of baby Maria under advisement, the latter with the stipulation that an investigation of the arrangements for supervision be made in Ohio. Dahlari was released to her father.

On August 29, 1972, Dahlari was detained by Monroe Police as a runaway (which plaintiff Dahlari denied) and a preliminary hearing was held on

August 31, 1972, before Referee Pace, who took the matter under advisement pending the dispositional hearing on the original petition.

On September 12, 1972, Judge Seitz, withtout further hearing, entered orders making baby Maria a permanent ward of the court, terminating Dahlari's parental rights and committing Dahlari to the Department of Social Services as a delinquent.

A copy of the Memorandum Opinion and Order of the Honorable Norman R. Barnard, Judge of Probate, discussed more fully below, indicates that as of September 12, 1972, baby Marie was in a Foster Care Boarding Home and remained in that home when an adoption petition was filed on February 5, 1972. Consent of the Probate Judge to the adoption was executed and filed on February 6, 1973 and the child is now living in the adoptive home.

On May 2, 1973 plaintiffs herein filed their complaint in this Court and, after certain preliminary procedures, a hearing on the merits of plaintiffs' claims for temporary and permanent equitable relief was held on June 12, 1973. At the conclusion of that hearing, the Court conferred with counsel and made certain suggestions in the hope that resolution of the matter could be expeditiously sought in the state court without intervention of the federal court. Counsel agreed and this case was held in abeyance. Thereupon, a petition was filed in behalf of Dahlari Weldon for a hearing in the matter concerning her child Maria in Monroe County Probate Court, Juvenile Division. The Honorable Norman R. Barnard, Judge of Probate for Oakland County, was assigned to hear the matter after Judge Seitz disqualified himself. A hearing was held on July 20, 1973, and on August 30, 1973, Judge Barnard filed his Memorandum Opinion and Order Denying Petition for Hearing. In brief, Judge

Barnard held that the petition was to be construed as one for a "re-hearing" and that under the Michigan statute (M.C.L.A. § 712A.21) and cases construing that statute, the Probate Court had no jurisdiction to entertain the petition since it was filed more than three months after the date of the entry of the order terminating parental rights. Judge Barnard also held that the child is no longer under the jurisdiction of the court since it had been placed by order of the Probate Court in an adoptive home.

Whereupon, plaintiffs repaired to this Court requesting, by its Motion for Partial Summary Judgment, an immediate adjudication on the merits.

The threshold issue is the one of the jurisdiction of this Court. It appears to the Court that plaintiffs' first two claims, i.e., the release of Dahlari Weldon from detention and the release of Maria Sophia Weldon from Probate Court custody, are clearly in the nature of habeas corpus relief and that this Court does not have jurisdiction over those claims in the absence of exhaustion of state remedies as required by 28 U.S.C. § 2254. Preiser v. Rodriquez, 411 U.S. 475 (1973). Moreover, since Dahlari is no longer in custody, her claim for release from detention is now moot.

Plaintiffs, however, also seek injunctive or equitable relief under 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343 (1970), claiming that plaintiff Dahlari Weldon's parental rights were terminated without the due process required by the Fourteenth Amendment. As to that issue, the Court determines that it does have jurisdiction.

In Mitchum v. Foster, 407 U.S. 225 (1972) the Supreme Court held that § 1983 authorizes injunctive relief against state court proceedings despite the proscriptions of 28 U.S.C. § 2283. The court also held

in Mitchum that the "power" to enjoin state court proceedings should be exercised with restraint and by application of traditional notions of equity, comity and federalism. (See Younger v. Harris, 401 U.S. 37 (1971)).

Having the utmost confidence in the competence of the Michigan Court System and its history of guarding the constitutional rights of its residents, this Court originally suggested that the attempt be made to resolve the due process issues in the state court. However, the peculiar circumstances of this case demand that this Court delay no longer procedures that have such a tremendous and permanent impact on the lives of two minors, a daughter not yet two years of age and the mother but 17.

In the first instance, the plaintiffs come into this Court seeking relief. Whatever their reasons may have been, this they had a perfect right to do and even though they could have pursued parallel remedies in the state courts. Monroe v. Pape, 365 U.S. 167, 183 (1961), Zwickler v. Koota, 389 U.S. 241, 248 (1967), Preiser v. Rodriquez, supra at 513-5 (dissenting opinion). This Court then held a hearing on the merits of the equitable claims [1]/ but stayed

[1]/ The Court was admittedly surprised at the hearing of September 24, 1973, when counsel for the defendants informed the Court that there was a dispute as to the facts and that they would like an opportunity to offer further testimony. Counsel asserted that they were not prepared for the June 12, 1973 hearing because they did not have adequate discovery due to time limitations. Such was certainly not the understanding of the Court and it is convinced that counsel was offered every opportunity to present any evidence. That the June 12th hearing was a hearing on the merits of the equity issues is not only borne out by the record but by the following language of counsel for Judge Seitz in his Memorandum of September 20, 1973:

"During the consolidated hearing herein on plaintiffs' motions for temporary and permanent injunctions . . ." (underlining supplied.)

decision after the agreement of the parties to attempt state court action. Judge Barnard did not, however, reach the merits, finding the jurisdictional obstacle an insurmountable one. The plaintiffs now find themselves in the position that requires an appeal of the jurisdictional finding of Judge Barnard through the Michigan appellate procedure and, if successful, a remand to that Court for a hearing on the merits — the same hearing already held by this Court on June 12, 1973. Certainly, while considerations of comity and federalism might have countenanced the delay if a hearing on the merits had been held in the state court expeditiously, such concepts cannot countenance the delay that must be anticipated under the present posture of the case. It would be unconscionable for this Court to stay its hand now when as is so evident we are faced with traumatic consequences whatever the decision might be. Particularly the Court must consider the effect of a change, if any is decreed, in the status of the plaintiff Maria.

Nor is it reason to abstain here that the plaintiffs could seek habeas corpus relief in the state court. That would involve other or additional parties and the posture of the parties and the frame of the issues would be difficult. And the question of delay, or course, is again a spectre.

Going then to the merits of the due process claim of plaintiffs, it should be borne in mind that the issue before this Court at this time involves the procedures regarding the delinquency of Dahlari. However, the delinquency proceedings are not without significance with regard to the due process issues of the termination of parental rights proceedings. The two proceedings are intermingled but the rights of plaintiff Dahlari in the former differ considerably

from those in the latter. Yet no cognizance was taken of the dilemma that is thus created, nor of its effect on the understanding or lack thereof on the part of the plaintiff Dahlari.

A careful review of this record, then, leads to the conclusion that plaintiffs have been deprived of due process rights of fundamental fairness guaranteed to them under the Fourteenth Amendment. Cf. In re Gault, 387 U.S. 1 (1967), McKeiver v. Pennsylvania, 403 U.S. 528 (1971). See also Armstrong v. Manzo, 380 U.S. 545 (1965).

Perhaps the most striking example of this deprivation is the failure to ascertain, or attempt to ascertain, from the plaintiff Dahlari at any time whether she understood the nature of the proceedings and the possible consequences. Her participation in the pertinent hearings, as shown by the transcripts, is limited to the mere mention of her presence. No inquiry was ever directed to her, no invitation to testify or make a statement. With respect to the most devastating testimony — that of Mrs. Friess that Dahlari had told her Mrs. Weldon had physically abused the baby — she was not asked to verify or deny. The fact that she was represented by counsel is barely an adequate rebuttal to her testimony, which this Court found credible, that she was not only not advised and did not understand the proceedings, but that she was confused as to which attorney represented her.

Another area of concern is the final order of September 12, 1972, which terminated parental rights. The record does not indicate the reasons for that action or the basis for the order. On the contrary, the August hearing had produced the testimony of Mr. Weldon as to his ability and willingness to care and support for the baby subject

to closest supervision of a court. That hearing was concluded with the stipulation that the Ohio authorities be contacted. Yet there is no indication that they were contacted and, if so, whether the results were favorable or unfavorable to the plaintiff and her parents. If unfavorable and a factor in the determination, fairness would have required some disclosure, or an opportunity to be heard.

As alluded to earlier, the joint consideration and hearing of both the delinquency case and the termination of parental rights case were inappropriate and could not but be confusing to Dahlari. While involving mutual facts, the issues are separate and distinct and the possibility of obfuscation great to the uninitiated.

This Court is left with this impression — that the defendants here being heavily concerned with the well-being of the baby Maria, and being frustrated by what may have been or appeared to be challenges, neglected to consider the rights, particularly, of the plaintiff Dahlari. As a result the form gave way to the substance and no real effort was made to assure that the plaintiff Dahlari was fully apprised of her rights, of the nature of the proceedings and of the possible irrevocable consequences. It must be remembered that at that time the principal figure was a 15 year old girl having severe home difficulties, was incarcerated in a juvenile institution and had not seen her child for several months. Such circumstances require much more than the pro forma procedures of service of process, appointment of counsel and presence in a hearing room.

Further, although it is arguable that the delay between the final order of termination of plaintiff Dahlari's parental rights and the filing of the

complaint in this Court subverts the statutory three month appeal limitation, such argument loses validity when it is considered that the plaintiff Dahlari was incarcerated during that period and there is no indication that she was advised of any rights she might have.

In accordance with the foregoing, then, this Court finds that the plaintiffs were deprived of due process in the termination of parental rights matters before the Probate Court for Monroe County and that, therefore, such proceedings are void.

IT IS, THEREFORE, ORDERED that the matter be remanded to that Court for hearing within 30 days of the filing hereof.

Philip Pratt

PHILIP PRATT
United States District Judge

Dated: September 28, 1973.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAHLARI WELDON, et al,

Plaintiffs,

vs.

CIVIL ACTION
No. 40054

MONROE COUNTY PROBATE COURT, et al,

Defendants.

_____/

JUDGMENT

This action having come on for trial before the Court on plaintiffs' claims for injunctive relief and the issues having been duly tried and a decision having been duly rendered in the Court's Memorandum Opinion and Order on Injunctive Issues; and

This action having also come on for hearing on plaintiffs' claims for money damages and the issues having been duly heard on defendants' motion for summary judgment and plaintiffs' motion for relief from judgment and decisions having been duly rendered in the Court's Memorandum Opinion and Order Partially Granting Defendants' Motion for Summary Judgment and Memorandum Opinion and Order Denying Plaintiffs' Motion for Relief from Judgment;

IT IS ORDERED AND ADJUDGED that the proceedings in the Probate Court for Monroe County, Michigan, involving the termination of plaintiff

Dahlari Weldon's parental rights to plaintiff Maria Sophia Weldon are void and that the matter be, and hereby is, remanded to the Probate Court for Monroe County for a hearing for a hearing to be held no later than thirty (30) days from September 28, 1973, and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' claims for money damages are denied.

No costs.

PHILIP PRATT
United States District Judge

Dated: October 25, 1973
Detroit, Michigan

NO. 74-1005
NO. 74-1006
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed: April 19, 1974
James A. Higgins, Clerk

DAHLARI WELDON, a minor, by Gabe Kaimowitz, as next friend, on her own behalf and on behalf of her infant daughter, Maria Sophia Weldon, a/k/a Thomas,

Plaintiff-Appellees
Plaintiff Cross-Appellants

- vs -

ORDER

MONROE COUNTY PROBATE COURT, HARRY J. SEITZ, Judge, Monroe County Probate Court, and James H. Stanifer, Juvenile Referee, Probate Court, Monroe, individually and in their official capacities, and their employees, agents, assignees and successors,

Defendants-Appellants
Defendants Cross-Appellees

BEFORE: PECK, MC CREE, and LIVELY, Circuit Judges.

These appeals were consolidated for hearing. Defendants' appeal is from the district court's determination that proceedings in the Probate Court for Monroe County, Michigan, resulted in the termination of plaintiff Dahlari Weldon's parental rights to her child, plaintiff Maria Sophia Weldon, are void for want of due process and from the district court's order remanding the cause to the probate court for a hearing. On cross-appeal, plaintiffs contend that the district court erred in dismissing their claim for money damages and that the district court's remand order was not specific enough to meet the requirements of Fed. R. Civ. P. 65(d).

Upon consideration of the briefs, record and arguments, we conclude that the district court properly dismissed plaintiffs' claim for damages, Bradley v. Fisher, 13 Wall (80 U.S.) 335 (1871), Pierson v. Ray, 386 U.S. 547 (1967), Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971), but that the district court did not have jurisdiction under 42 U.S.C.§ 1983 and 28 U.S.C. 1343 to review and set aside the probate court's proceedings and to order the probate court to conduct another hearing. See City of Kenosha v. Bruno, 412 U.S. 507 (1972).

It is therefore ORDERED that the judgment of the district court be, and it is affirmed insofar as it dismissed the claim for money damages and that the judgment be, and it is reversed insofar as it held the probate court's proceedings to be void and ordered the probate court to conduct a hearing. The case is remanded to the district court to consider insofar as a Section 1983 action may be maintained against the individual defendants, whether the district court can fashion appropriate relief not barred by Preiser v. Rodriguez, 411 U.S. 475 (1973), and whether notions of comity in federal-state relations otherwise require

deferral to state procedures. See, e.g., Williams v. Dalton, 231 F.2d 646 (6th Cir. 1956). Alternatively, the district court may consider whether to treat the action as an application for habeas corpus, see, e.g., Bennett v. Allen, 396 F.2d 788(9th Cir. 1968), and if so considered, whether plaintiffs must satisfy the exhaustion requirements of 28 U.S.C. §2254(b). No costs.

Entered by order of the court

John P. Hehman

Clerk

John P. Hehman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAHLARI WELDON, et al,

Plaintiffs,

vs.

CIVIL ACTION
No. 40054

MONROE COUNTY PROBATE COURT,

et al,

Defendants.

MEMORANDUM OPINION AND ORDER

This action is presently before the Court on remand from the order of the Court of Appeals entered on April 19, 1974. In that order, the Court of Appeals affirmed this Court's Judgment dismissing plaintiffs' claims for money damages but reversed insofar as this Court "held the probate court's proceedings to be void and ordered the probate court to conduct a hearing." The Court of Appeals then remanded the case for further consideration. [1/]

[1/] Insofar as pertinent the Order issued by the Court of Appeals reads as follows:

"Upon consideration of the briefs, record and arguments, we conclude that the district court properly dismissed plaintiffs' claim for damages, Bradley v. Fisher, 13 Wall (80 U.S.) 335 (1871), Pierson v. Ray, 386 U.S. 547 (1967), Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971), but that the district court did not have jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. 1343 to review and set aside the probate

In order to place the issues currently before the Court in proper prospective, a brief statement of the history of this case is necessary. Plaintiff Dahlari Weldon is the natural mother of Maria Sophia Weldon, an infant, who is also named as a plaintiff herein. Maria was born on October 18, 1971, when Dahlari was 14 years of age.

On May 2, 1973 plaintiffs filed their complaint in this action against the Monroe County Probate Court, Harry J. Seitz, a judge of that court, and James H. Stanifer, the court's juvenile referee, for violation of plaintiffs' constitutional rights. Jurisdiction was alleged solely upon 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The complaint was soon amended to name Shirley Friess, a juvenile case worker for the Probate Court, as a party defendant.

In their complaint, plaintiffs allege that defendants have violated their constitutional rights guaranteed under the Fourteenth Amendment. The action arises from the termination of the parental rights of Dahlari Weldon with respect to her daughter Maria Sophia Weldon. Both monetary damages and equitable relief are sought in the complaint. [2/] Due to the urgency of the matter because adoption proceedings had already begun for Maria, the Court set an accelerated trial date (June 12, 1973) for all claims for injunctive and other equitable relief.

Immediately after the trial was completed, the parties, pursuant to a suggestion by the Court, sought to obtain a new hearing before another judge in state court in order to remedy the alleged procedural inadequacies of the original proceedings. This motion, however, was denied on grounds that it was, in effect a motion for rehearing which was untimely.

Since the plaintiffs attempted resort to state court had met with failure, this Court rendered its decision on the merits of plaintiffs' claims for injunctive relief. Finding that the state procedures were insufficient to comply with the requirements of due process mandated by the Fouteenth Amendment, the Court held that defendants had violated plaintiffs' constitutionally protected rights. [3/] The Court further held the Probate Court proceedings void and ordered that the case be remanded to the Monroe County Probate Court for a new hearing within thirty days.

Apparently on the basis of this order, a new hearing was held in the Monroe County Probate Court before a visiting judge on the original neglect petition on October 22-25, 1973. Judge Mitchell, therein, found no evidence of neglect and dismissed the petition. Thereupon, Mr. and Mrs. John Doe, the

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court's proceedings and to order the probate court to conduct another hearing. See City of Kenosha v. Bruno, 412 U.S. 507 (1972).

"It is therefore ORDERED that the judgment of the district court be, and it is affirmed insofar as it dismissed the claim for money damages and that the judgment be, and it is reversed insofar as it held the probate court's proceedings to be void and ordered the probate court to conduct a hearing. The case is remanded to the district court to consider insofar as a Section 1983 action may be maintained against the individual defendants, whether the district court can fashion appropriate relief not barred by Preiser v. Rodriguez, 411 U.S. 475 ,1973), and whether notions of comity in federal - state relations otherwise require deferral to state procedures. See e.g., Williams v. Dalton, 231 F. 2d 646 (6th Cir. 1956). Alternatively, the district court may consider whether to treat the action as an application for habeas corpus, see, e.g., Bennett v. Allen, 396 F. 2d 788 (9th Cir. 1968), and, if so considered, whether plaintiffs must satisfy the exhaustion requirements of 28 U.S.C. §2254 (b). No costs."

[2/] Since this Court's prior judgment dismissing plaintiffs' claim for damages was affirmed by the Court of Appeals, that portion of the case is no longer before the Court and thus will not be discussed further in this memorandum.

[3/] The Order of the Court of Appeals does not disturb this finding.

prospective adoptive parents of Maria, filed a complaint in Superintending Control against Judge Mitchell and others in Monroe County Circuit Court. Dahlari Weldon also sought habeas corpus relief in the same court on the basis of Judge Mitchell's findings. After numerous hearings, Circuit Judge James J. Kelley ordered Maria's custody transferred from the Does to Dahlari Weldon. This order was stayed and an appeal from the Monroe County Circuit Court is currently pending before the Michigan Court of Appeals.

In the meantime, defendants in this action perfected an appeal to the federal Court of Appeals. In its Order (supra, n.1), that court held that a federal court has no jurisdiction in an action brought under Section 1983 to hold the probate court's proceeding void and to order a state court to hold a hearing. This ruling was based on the fact that a state court, like a municipality, is not a "person" within the meaning of the term used in Section 1983. There being no claim presented under Section 1983, the Court therefore would lack subject matter jurisdiction under 28 U.S.C. § 1343(3) and (4). City of Kenosha v. Bruno, 412 U.S. 507 (1973). The Court of Appeals then remanded the case for consideration whether an action under Section 1983 may be maintained against the individual defendants. [4/]

On the basis of the decision of the Court of Appeals, all claims against the defendant Monroe County Probate Court must be dismissed for lack of

[4/] The Court of Appeals specifically requested consideration of the following questions:

1) Whether the district court can fashion appropriate relief not barred by Prieser v. Rodriguez, 411 U.S. 475 (1973); and

2) Whether notions of comity in federal-state relations otherwise require deferral to state procedures. See. e.g., Williams v. Dalton, 231 F.2d 646 (6th Cir. 1956).

jurisdiction. Pursuant to the directions of the Court of Appeals, we must now turn to plaintiffs' remaining claims for equitable and injunctive relief against the individual defendants.

In their complaint, plaintiffs sought an order from this Court requiring defendants and their agents (presumably the prospective adoptive parents — the Does) to return Maria to her natural mother, Dahlari Weldon. Since this claim is equivalent to that available through a writ of habeas corpus, the Court must necessarily apply 28 U.S.C. § 2254. Preiser v. Rodriguez, 411 U.S. 475 (1973). Although the matter is currently being litigated in state court, available state remedies clearly have yet to be exhausted. Accordingly, this Court necessarily lacks jurisdiction to grant relief in the nature of habeas corpus.

Plaintiffs additionally request that defendants be ordered to rescind the termination of parental rights. With respect to this claim, the Court clearly has jurisdiction but it must yet be determined whether these defendants are judicially immune from suit and whether this relief is appropriate giving due weight to traditional considerations of equity, comity and federalism.

The individual defendants initially contend that any action for equitable or injunctive relief based upon Section 1983 is barred under the doctrine of judicial or quasi-judicial immunity. [5/]Thus, the issue presented is whether the immunity bars claims for equitable relief as well as claims for monetary damages. Although the Supreme Court has never di-

[5/] On the damages claim, the Court previously held that the individual defendants acted within their jurisdiction and that therefore any claim for monetary damages was barred. Pierson v. Ray, 386 U.S. 547 (1967).

rectly decided the question, the great weight of current authority has held that the doctrine of judicial immunity does not bar civil rights actions against judges or other personnel such as prosecutors for equitable or injunctive relief. Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), rev'd on other grounds sub. nom.; O'Shea v. Littleton, 414 U.S. 488 (1974); Erdmann v. Stevens, 458 F.2d 1205, 1208 (2d Cir. 1972), cert. denied 409 U.S. 889; Jacobson v. Schaefer, 441 F.2d 127, 130 (7th Cir. 1971); Peek v. Mitchell, 419 F.2d 575, 578 (6th Cir. 1970); Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 123 (S.D. N.Y. 1969) (3 judge court) (Friendly, J.), aff'd on other grounds 401 U.S. 154. See also Conover v. Montemuro, 477 F.2d 1073 (3rd Cir. 1973). Contra, Tate v. Arnold, 223 F. 2d 782 (8th Cir. 1955); Smallwood v. United States, 358 F. Supp. 398 (E.D. Mo. 1973), aff'd without opinion, 486 F.2d 1407 (8th Cir. 1973).

While not directly deciding this issue, the Supreme Court has decided a number of significant cases which apparently rest upon an assumption that the immunity doctrine does not apply to claims for equitable relief. In Mitchum v. Foster, 407 U.S. 225 (1972), the Court held that Section 1983 came within the "expressly authorized" exception to the anti-injunction statute at 28 U.S.C. § 2283 and that in limited circumstances a federal court could enjoin state court proceedings. In that case the defendant Foster was the state prosecuting attorney who would normally be clothed with quasi-judicial immunity. The defendants in both Younger v. Harris, 401 U.S. 37 (1971) and Samuels v Mackell, 401 U.S. 66 (1971) were also prosecuting attorneys. Additionally, in Boyle v. Landry, 401 U.S. 77 (1971) the defendants included the Chief Judge and two Magistrates of the Circuit Court and the county State's Attorney. It

would appear highly unlikely that the Supreme Court would have considered these cases on their merits if any claims for equitable relief would have been barred on immunity grounds. Accordingly, we must proceed to the merits of plaintiffs' equitable claims.

In determining the type of relief, if any, which may be fashioned, the Court is cognizant that it must look to the principles of equity, comity and federalism. See Mitchum v. Foster, supra, at 243; Williams v. Dalton, 231 F.2d 646 (6th Cir. 1956). Cf. Samuels v. Mackell, supra. In making this decision we must look to the factual setting as the case presently stands before the Court. This Court has conducted a trial on the federal constitutional issues and has determined that the parental rights of plaintiff Dahlari Weldon were terminated by defendants in a manner inconsistent with her procedural rights granted by the Fourteenth Amendment. On the basis of this ruling, new proceedings were instituted in state court resulting in an order requiring Maria to be returned to Dahlari. An appeal from that decision is now pending in the state Court of Appeals.

In light of these facts the Court believes that its prior decision that plaintiff Dahlari Weldon's parental rights were terminated without the due process of law and the proceedings held before the individual defendants were void must be reaffirmed. Since the courts of the state originally declined to consider the issues raised in this action, comity is no bar. Moreover, the importance of the federal right involved indicates that we should adjudicate it in this form.

Nevertheless, the Court does not believe injunctive relief of the type sought is now appropriate. Given the fact that this Court now lacks jurisdiction

to order return of Maria to her natural mother Dahlari Weldon as noted above, plaintiffs must first pursue available state remedies on that score. Moreover, at present this Court has no reason to believe that the courts of the State of Michigan will not give a judgment rendered by this Court full faith and credit. Accordingly, applying general principles in equity, an injunction is not now warranted. The Court furthermore believes that at this time the requisite showing contemplated by the Supreme Court in Mitchum v. Foster, supra, for a federal court to enjoin state proceedings has been satisfied.

While injunctive relief is not now appropriate, the Court does believe that it should issue its judgment declaring the rights of the parties. 28 U.S.C. § 2001. Since the parties before this Court have fully litigated the federal constitutional issues arising from the proceedings in the Monroe County Probate Court, it is within the Court's inherent equity powers to grant declaratory relief. In fact, because such relief is much less intrusive upon pending state proceedings, it is far preferable to injunctive relief.

Therefore, in accordance with the foregoing and with the findings in this Court's original opinion on plaintiffs' equitable claims, the Court holds that the proceedings in the Monroe County Probate Court before the individual defendants herein which resulted in the termination of plaintiff Dahlari Weldon's parental rights with respect to her natural daughter, plaintiff Maria Sophia Weldon, were in violation of the due process rights of plaintiffs guaranteed by the Fourteenth Amendment to the Constitution of the United States. Jurisdiction will be retained pending conclusion of litigation on related

matters in state courts in the event further equitable relief may later prove necessary.

IT IS SO ORDERED.

PHILIP PRATT
United States District Judge

Dated: July 25th, 1974
Detroit, Michigan.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAHLARI WELDON, et al,

Plaintiffs,

vs.

CIVIL ACTION
No. 40054

MONROE COUNTY PROBATE COURT, et al,

Defendants.

JUDGMENT

This action having come before the Court on remand from the United States Court of Appeals for the Sixth Circuit, and pursuant to the directions of that Court,

IT IS HEREBY ORDERED AND ADJUDGED,

1. That this action be dismissed as to the defendant Monroe County Probate Court for lack of jurisdiction over the subject matter; and

2. That plaintiffs be, and hereby are granted a declaratory judgment that the proceedings in the Monroe County Probate Court before defendants Harry J. Seitz, James H. Stanifer and ShirleyFreiss, which resulted in the termination of plaintiff Dahlari Weldon's parental rights with respect to her natural daughter, plaintiff Maria Sophia Weldon, were in violation of the due process rights of plaintiffs guaranteed by the Fourteenth Amendment to the Constitution of the United States.

NO. 74-2095
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed: Feb. 12, 1976
John P. Hehman, Clerk

DAHLARI WELDON, et al.

Plaintiffs-Appellees

v.

MONROE COUNTY PROBATE COURT, et al.

Defendants-Appellants

ORDER

BEFORE: PECK, McCREE and LIVELY, Circuit Judges.

This case has been considered on the record together with briefs and oral arguments of counsel. It was agreed at oral argument by counsel for appellants that the only issue on appeal is whether the district court had jurisdiction and, if such jurisdiction existed, whether it should have declined to proceed in the cause on the basis of considerations of comity, equity and federalism. We conclude that the district court did have jurisdiction and that it gave due consideration to principles of comity, equity and federalism.

Accordingly the judgment of the district court is affirmed for the reasons set forth in the opinion of

No costs. Jurisdiction will be retained pending conclusion of litigation in the courts of the State of Michigan in related matters.

PHILIP PRATT
United States District Judge

Dated: July 25th, 1974.
Detroit, Michigan.

United States District Judge Philip Pratt dated July 25, 1974.

ENTERED BY ORDER OF THE COURT

John P. Hehman

Clerk

John P. Hehman

NO. 74-2095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed March 19, 1976
John P. Hehman, Clerk

DAHLARI WELDON, et al.

Plaintiffs-Appellees

v.

MONROE COUNTY PROBATE COURT, et al.

Defendants-Appellants

ORDER

BEFORE: PECK, McCREE and LIVELY, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by the defendants - appellants the court concludes that said petition is without merit.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman

MOTION FILED
MAR 3 1977

76-211

IN THE SUPREME COURT OF THE UNITED STATES

Monroe County Probate Court, et al.,

Petitioners

vs. No. A-1067

Dahlari Weldon, et al.,

Respondents

* * *

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT FOR WRIT OF CERTIORARI AND BRIEF BY THE MICHIGAN PROBATE AND JUVENILE JUDGES ASSOCIATION AND THE MICHIGAN FEDERATION OF PRIVATE CHILD AND FAMILY AGENCIES

* * *

FRED S. FINDLING, P.C.

By: Fred S. Findling
By: Joseph Findling
Attorneys for *Amici Curiae*
Michigan Probate and Juvenile Judges Association, and the Michigan Federation of Private Child and Family Agencies
3005 Cadillac Tower
Detroit, MI 48226
(313) 965-1366

IN THE SUPREME COURT OF THE UNITED STATES

Monroe County Probate Court,
et al.,

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* * *

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT FOR WRIT OF CERTIORARI AND BRIEF BY THE MICHIGAN PROBATE AND JUVENILE JUDGES ASSOCIATION AND THE MICHIGAN FEDERATION OF PRIVATE CHILD AND FAMILY AGENCIES

* * *

FRED S. FINDLING, P.C.

by: Fred S. Findling, and
by: Joseph Findling
Attorneys for *Amici Curiae*
Michigan Probate and Juvenile
Judges Association, and
Michigan Federation of Private
Child and Family Agencies
3005 Cadillac Tower
Detroit, MI 48226
(313) 965-1366

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MOTION

The Michigan Probate and Juvenile Judges Association and the Michigan Federation of Private Child and Family Agencies seek leave to file Brief *Amicus Curiae* in support for Writ of Certiorari for the following reasons:

1. On July 25, 1974, the federal district court granted Respondents a declaratory judgment holding that the proceedings by the Monroe County Probate Court violated Respondents' due process rights. The federal district court retained jurisdiction until conclusion of litigation in the courts of the state of Michigan. This declaratory judgment was granted even though Respondents had failed to exhaust available state remedies.

2. The United States Court of Appeals for the Sixth Circuit affirmed.

3. These decisions by the courts below jeopardize all adoption proceedings in the state of Michigan and threaten with uncertainty the lives of children whose greatest need is certainty.

4. These decisions by the courts below reinsert the federal courts into areas where this Court, in recent decisions, has, as a matter of law and policy, prohibited federal court intervention.

WHEREFORE, the Michigan Probate and Juvenile Judges Association and the Michigan Federation of Private Child and Family Agencies request this Court to

grant them leave to file a Brief *Amicus Curiae* in support for Writ of Certiorari.

FRED S. FINDLING, P.C.

By: FRED S. FINDLING
By: JOSEPH FINDLING
Attorneys for Michigan Probate and
Juvenile Judges Association
and
Michigan Federation of Child
and Family Agencies, *Amici Curiae*
3005 Cadillac Tower
Detroit, MI 48226
965-1366

Dated: February 23, 1977

RESOLUTION
MICHIGAN PROBATE AND
JUVENILE COURT JUDGES ASSOCIATION,
EXECUTIVE COMMITTEE
JANUARY 27, 1977

WHEREAS, the MPJCJA recognizes the magnitude of the jurisdictional questions involved in the Weldon case currently on Petition for Certiorari to the United States Supreme Court, and,

WHEREAS, the Michigan Federation of Private Child And Family Agencies has also expressed their concern by Resolution adopted January 13, 1977, and

WHEREAS, an Order Terminating Parental Rights is the cornerstone in all adoptions and collateral attack on such Orders in the Federal Courts destroys the finality of said Orders and renders all adoptions subject to such attacks rather than being reviewed by way of appeal and/or Habeas Corpus in the State Courts.

IT IS MOVED AND SUPPORTED, that the Judges Association seek to intervene by Amicus Curiae brief either separately or jointly with the Michigan Federation of Private Child And Family Agencies. Motion carried.

MICHIGAN FEDERATION
OF PRIVATE CHILD AND FAMILY AGENCIES
1035 North Washington Avenue
Lansing, Michigan 48906
Phone: (517) 485-8552

January 21, 1977

Mr. James Rostach
Attorney at Law
21 Washington Street
Monroe, MI 48161

Dear Mr. Rostach:

This letter will confirm the message I shared with you by phone on January 14 indicating the moral support and commitment to help with some funding on the case moving toward the U.S. Supreme Court. The following resolution was passed by the Federation's Board of Directors and the Federation membership at their meeting on January 13, 1977:

> WHEREAS the Monroe County Probate Court staff and the Monroe County commissioners have been carrying the moral and financial load of a legal challenge to good adoption practice by themselves until now: and
>
> WHEREAS, the issues are:
> a challenge to the permanency of the Order Terminating Parental Rights, as well as a challenge to the established method of appeals within the State Court structures, instead utilizing the Federal Court System; and
>
> WHEREAS these issues will affect all adoptions and all agencies doing adoption work;
>
> BE IT RESOLVED that the Federation encourage the attorneys representing the Monroe

> County Court staff to request a hearing by the U.S. Supreme Court, and that the Federation commit funds to help offset the costs of presenting this issue to the Supreme Court if it is needed.

I trust that you will keep in touch with me as plans progress.

Very sincerely yours,

Hudson J. Nyenhuis

Hudson J. Nyenhuis, Chairman
Federation Adoption Committee

hjn/ak

IN THE SUPREME COURT
OF THE UNITED STATES

Monroe County Probate Court,
et al.,

Petitioners

vs. No. A-1067

Dahlari Weldon, et al.,

Respondents

* * *

BRIEF FOR THE MICHIGAN PROBATE AND JUVENILE JUDGES ASSOCIATION AND THE MICHIGAN FEDERATION OF PRIVATE CHILD AND FAMILY AGENCIES IN SUPPORT FOR WRIT OF CERTIORARI

I. QUESTIONS PRESENTED.

There are two questions which have far-reaching consequences to the Michigan Probate Courts and the Michigan agencies involved in adoptions whose task it is to bring finality, order and certainty into the lives of many children who merited the interest and involvement of the state because of the failure of their parents to provide them with proper nurture and care.

1. Should collateral attack in federal district court, to matters of termination of parental rights arising out of state courts, be permitted before there has been an exhaustion of remedies in the state courts?

2. Does the declaratory judgment and retention of jurisdiction by the federal district court, affirmed by the United States Court of Appeals for the Sixth Circuit, pre-

vent independent consideration by the state courts of relevant issues?

II. STATUTES INVOLVED.

MCLA 712A.19a:

Sec. 19a. Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:

(a) The child has been deserted and abandoned without provision for identification for a period of at least 6 months and the public or private agency having temporary custody of the child has made a reasonable attempt to locate the parent.

(b) The child is left with intent of desertion and abandonment by his parent or guardian in the care of another person without provision for his support or without communication for a period of at least 6 months. The failure to provide support or to communicate for a period of at least 6 months shall be presumptive evidence of the parent's intent to abandon the child. If, in the opinion of the court, the evidence indicates that the parent or guardian has not made regular and substantial efforts to support or communicate with the child, the court may declare the child deserted and abandoned by his parent or guardian.

(c) A parent or guardian of the child is unable to provide proper care and custody for a period in excess of 2 years because of a mental deficiency or mental illness, without a reasonable expectation that the parent will be able to assume care and custody of the child within a reasonable length of time considering the age of the child.

(d) A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or

guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years.

(e) The parent or guardian is unable to provide a fit home for the child by reason of neglect.

(f) The child has been in foster care in the temporary custody of the court on the basis of a neglect petition for a period of at least 2 years and upon rehearing the parents fail to establish a reasonable probability that they will be able to reestablish a proper home for the child within the following 12 months.

MCLA 712A.21:

Any interested person, at any time while the child is under the jurisdiction of the court, may file a petition, in writing and under oath, for a rehearing upon all matters coming within the provisions of this chapter, and upon the rehearing the court may affirm, modify or set aside any order so reviewed. If parental rights have been terminated by an order entered in the proceedings and custody of the child has been removed from the parents, guardian or other person, the petition for rehearing shall be filed within three months from the date of entry of the order terminating parental rights . . . . The rehearing shall be conducted in accordance with the provisions of this chapter relative to the conduct of original hearings. At any time the court may enter an order for supplemental disposition as long as the child remains under the jurisdiction of the court.

MCLA 712A.22:

Appeal may be taken to the circuit court by the prosecuting attorney or any person aggrieved by any order of the juvenile division of the probate court. . . . The

pendency of an appeal shall not suspend the order unless the circuit court shall specifically so order. A petition for a delayed appeal shall be filed within six months after the making of the judgment or order complained of.

MCLA 600.4307:

An action for habeas corpus to inquire into the cause of detention may be brought by or on behalf of any person restrained of his liberty within this state under any pretense whatsoever, except as specified in Section 4310.

COURT RULE INVOLVED

JCR 1969, 6.3(A) (2)

Unless waived as provided by Rule 6.2, counsel shall be appointed on the court's own motion to represent the parents, guardian or custodian of the child charged with offense against the child at hearings which may involve termination of their rights when legal aid or public defender counsel is not available, and they are financially unable to employ counsel to represent themselves. The court may, upon request therefor, when legal aid or public defender counsel is not available and they are financially unable to employ counsel to represent themselves, appoint counsel to represent such persons at other hearings conducted under provisions of the Juvenile Code or these Rules.

III. ARGUMENT.

The case at bar is the best reason why there should be exhaustion of adequate and available state court remedies before resort is had to the federal courts.

For five years, the life of Maria Weldon has been in limbo because Respondents, failing to avail themselves of available remedies in state court, have sought recourse to a federal court they thought more suitable to their purpose.

If such forum-shopping is to be allowed, the social effect may well be disastrous.

Every year thousands of children are adopted in the state of Michigan, many of whom were made available for adoption through neglect and dependency proceedings resulting in termination of parental rights.

The law to be applied in Michigan in termination of parental rights proceedings, is well settled and provisions for the presence of counsel to represent both parents and children are mandatory. JCR 1969, 6.3(A)(2)(b).

Guidelines are available to the probate courts to insure uniform state-wide consideration of criteria to be applied by the courts in determining termination of parental rights and permanent custody. MCLA 712A.19a.

There are provisions for rehearing, MCLA 712A.21; appeal, MCLA 712A.22; and habeas corpus, MCLA 600.4307.

No Michigan adoption can be settled if parties to a termination of parental rights proceedings may, at their election, have recourse to federal courts before exhausting state court remedies.

If such a situation were permitted, litigants would not be able to rely on Michigan statutes and case law but would have to be ever mindful of decisions which might come down from the federal courts on a case by case basis.

On the national scale, the implications are horrendous.

The trauma to the children involved in these matters can be great. The perception of time by children differs from that of adults and to a small child an hour may seem like a month, a month like a year, and a year like eternity.

The federal district court also expressed its concern

over the traumatic consequences which would result should the court stay its hand after having come so far.

However, for the federal district court to view this as a basis for asserting jurisdiction is bootstrap reasoning. The feared potential trauma was engendered by the federal district court asserting jurisdiction where none was warranted.

The assertion of federal court jurisdiction presupposes the inability of a state forum to arrive at a just and equitable determination of the issues.

The claim of the federal district court, that the state courts declined to consider the issues raised in this action, is in error.

The assertion of jurisdiction by the federal district court pre - empted state consideration of the issues. The res judicata effect given the judgment of the federal district court prevented the state courts from ever reaching the merits of Respondents' case.

In *Younger v Harris*, 401 US 37, 27 L Ed 2d 669, 91 S Ct 746 (1971), this Court barred federal courts from enjoining state criminal proceedings excepting extraordinary circumstances.

There is no assertion on the part of Respondents attacking the constitutionality of Michigan law or asserting any of the above extraordinary circumstances.

Respondents did not avail themselves of three applicable statutory remedies, to-wit: MCLA 712A.21 - Rehearing; MCLA 712A.22 - Appeal; MCLA 600.4307 - Habeas Corpus.

The availability of state remedy extends to allowing an appeal pro forma pauperis to state circuit court from termination of parental rights, including the appointment of counsel and availability of free transcripts. *See:*

Reist v Bay Circuit Judge, 396 Mich 326, 241 NW 2d 55 (1976).

Applying *Preiser v Rodriguez,* 411 US 475, 36 L Ed 2d 439, 93 S Ct 1827 (1973), the federal district court held that, because Respondents failed to exhaust available state remedies, the federal district court lacked jurisdiction to order the return of Maria Weldon to her mother.

The federal district court is asserting jurisdiction to supervise state courts even though *Preiser* prevents it from asserting jurisdiction to act.

III. CONCLUSION.

Retention of jurisdiction by the federal district court implies that further proceedings in the state courts, and judgments resulting therefrom, must meet the approval of the federal district court. This, in effect, is tantamount to a collateral attack on all state court actions not in conformity with the opinion of the federal district court.

Respondents' original request for relief in the federal district court, in its barest form, was a request for habeas corpus which, pursuant to *Preiser,* required the exhaustion of available state court remedies.

Based on the issues presented and consideration of federal policy, the Michigan Probate and Juvenile Judges Association and the Michigan Federation of Private Child and Family Agencies respectfully request that this Court grant a writ of certiorari to review the February 12, 1976 decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

FRED S. FINDLING, P.C.

By: FRED S. FINDLING
By: JOSEPH FINDLING
Juvenile Judges Association
and
Michigan Federation of Children
and Family Agencies, *Amici Curiae*
3005 Cadillac Tower
Detroit, MI 48226
965-1366

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* in Support for Writ of Certiorari by the Michigan Probate and Juvenile Judges Association and the Michigan Federation of Private Child and Family Agencies were caused to be duly served on Edward H. Devoe and Bugbee & Conkle, by Warren D. Wolfe, Attorneys for Petitioners Judge Harry J. Seitz, James Stanifer and Shirley Friess, 13th Floor, Toledo Trust Bldg., Toledo, Ohio 43604; Gabe Kaimowitz, Attorney for Respondents Dahlari Weldon and Marie Sophia Weldon, Wayne State School of Law, Annex Building, Detroit, Michigan 48202; and Bettye S. Elkins, Esq., Guardian ad Litem for Respondent Maria Sophia Weldon, 2700 City National Bank Bldg., Detroit, Michigan 48226, by ordinary United States mail, first class postage prepaid, this 2nd day of March, 1977.

FRED S. FINDLING, P.C.

By: Fred S. Findling
By: Joseph Findling
Attorneys for *Amici Curiae*
Michigan Probate and Juvenile
Judges Association, and the
Michigan Federation of Private
Child and Family Agencies
3005 Cadillac Tower
Detroit, MI 48226
(313) 965-1366